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IN THE

Supreme Court of the United States

CITY OF SAN ANTONIO and TEXAS TOWING CORPORATION,

Petitioners,

v.

BRENDA L. STUCKY, d/b/a Bill's Wrecker Service, and RICHARD VILLANEVA, d/b/a Creswell's 24 Hour Wrecker Service,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Whether the contract for towing services between the City of San Antonio and Texas Towing and relevant ordinances and code provisions, if deemed subject to any preemptive effect of the Federal Aviation Administration Authorization Act, 49 U.S.C. § 14501(c)(1), fall within the public safety exception under that Act and whether the public safety exception contained in (c)(2)(A) has been properly interpreted to exclude a State's right to delegate public safety authority to municipalities.

Whether the contract for towing services between the City of San Antonio and Texas Towing and relevant ordinances and code provisions are proprietary in nature and therefore not subject to preemption by the Federal Aviation Administration Authorization Act, 49 U.S.C. § 14501(c)(1) under the theory set forth in *Building & Constr. Trades Council v. Associated Builders & Contractors of Massachusetts/ Rhode Island, Inc.*, 507 U.S. 218 (1993).

LIST OF PARTIES

1. City of San Antonio	Defendant/Counter-Plaintiff/Petitioner
2. Texas Towing Corporation	Intervenor/Counter-Plaintiff/Petitioner
3. Brenda L. Stucky, d/b/a Bill's Wrecker Service	Plaintiff/Counter-Defendant/Respondent
4. Richard Villaneva, d/b/a Creswell's 24 Hour Wrecker Service	Plaintiff/Counter-Defendant/Respondent

STATEMENT PURSUANT TO RULE 29.6

Petitioner, Texas Towing Corporation, is wholly owned by Miller Industries Incorporated, which is publicly traded.

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Petitioners City of San Antonio and Texas Towing Corporation respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals, dated July 30, 2001, is reported at 260 F.3d 424 (5th Cir. 2001). (App. A) The district court order granting in part the Petitioners' motions for summary judgment was filed April 4, 2000, and is reported at 2000 WL 33348252 (W.D. Tex., Apr. 4, 2000). (App. B) The district court judgment granting judgment in favor of the City of Antonio was filed on May 4, 2000. (App. C) The district court amended judgment granting judgment in favor of the Petitioners was filed on May 23, 2000. (App. D)

STATEMENT OF JURISDICTION

The judgment sought to be reviewed was entered by the Fifth Circuit Court of Appeals on July 30, 2001. The opinion on denial of the petitions for rehearing, dated September 14, 2001, is reported at 266 F.3d 342 (5th Cir. 2001). (App. E) The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTES AND REGULATIONS INVOLVED

The Federal Aviation Administration Authorization Act of 1994 amended the Interstate Commerce Act, 49 U.S.C. § 11501(h). The Interstate Commerce Commission Termination Act, passed in 1995, recodified 49 U.S.C. § 11501(h) at 49 U.S.C. § 14501(c). Section 14501(c) reads:

(c) Motor carriers of property. —

(1) General rule. — Except as provided in paragraphs (2) and (3), a State, political subdivision of a State, or political authority of 2 or more States may not enact or enforce a law, regulation, or other provision having the force and effect of law related to a price, route, or service of any motor carrier (other than a carrier affiliated with a direct air carrier covered by section 41713(b)(4)) or any motor private carrier, broker, or freight forwarder with respect to the transportation of property.

(2) Matters not covered. — Paragraph (1) —

> **(A)** shall not restrict the safety regulatory authority of a State with respect to motor vehicles, the authority of a State to impose highway route controls or limitations based on the size or weight of the motor vehicle or the hazardous nature of the cargo, or the authority of a State to regulate motor carriers with regard to minimum amounts of financial responsibility relating to insurance requirements and self-insurance authorization.

Also relevant are San Antonio City Ordinance No. 31977 (now codified at § 19-391 in the SAN ANTONIO MUNICIPAL CODE), San Antonio City Ordinance No. 77716, San Antonio City Ordinance No. 82744, and San Antonio City Ordinance No. 87775. These provisions are included as part of the Appendix (App. F-J).

STATEMENT OF THE CASE

A. Statement of Facts

This case arises from the public property towing system formulated by the City of San Antonio. Prior to 1963, there existed no City limitation of public property, non-consensual towing in San Antonio. (R. 822-23) Most wrecker services vying for tow opportunities monitored police radio transmissions, only to race to the scene of an accident in the hopes of obtaining business from the individuals involved, a process some refer to as "wreck chasing."[1] (R. 822-23) Typically, more than one company would appear at the scene, leading to a dispute as to which company would provide the towing services needed. (R. 822-23, 1043) There was no guarantee that the wrecker who arrived would have with it the proper equipment to accomplish the tow. In addition, the race to the scene created public safety dangers, not only because of the wreckers' excessive speed, but also due to the congestion of roadways, which made it difficult or impossible for emergency medical personnel to timely respond and which created extra work for those police officers at the scene. (R. 822-23, 1043)

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1. *See Whitten v. Vehicle Removal Corp.*, 56 S.W.3d 293, 299 n.3 (Tex. App. – Dallas 2001, pet. filed); *New Orleans Towing Ass'n v. City of New Orleans*, 2000 WL 193071, *1 (E.D. La., Feb. 15, 2000) ("Wreck chasing is a practice by which tow truck operators race to the scene of an accident in order to offer unsolicited assistance to disabled vehicles. Tow truck operators often use police radios and monitor police radio frequencies in order to determine the location of these accidents"), *abrogated by Stucky*; *Andrada v. City of San Antonio*, 555 S.W.2d 488, 490 (Tex.Civ.App. – San Antonio 1977, *writ dism'd*) (recognizing competitive environment and attendant safety concerns).

On December 12, 1963, the San Antonio City Council enacted City Ordinance No. 31977, which placed full authority to direct the towing of vehicles involved in collisions on City streets in the Chief of Police or his authorized representative. (R. 423) This ordinance, extending the same authority to the City's Director of Parking, subsequently was codified as City Code § 19-391. (R. 14) After passage of this ordinance, towing services were requested on a rotation basis from contracted towing companies. (R. 830) The rotation system, however, caused numerous problems due to delays, the unavailability of wreckers, and improper equipment. (R. 824-25) In 1977, the City entered into an exclusive contract for the provision of towing services with City Towing Associates, Inc. (R. 823) This contract remained in effect, by extensions, until the late 1980's. At that point, other towing companies initiated suit in federal court alleging violations of the Sherman Antitrust Act. In response, the City amended its contract with City Towing to create a prime contractor/subcontractor rotation system. (R. 830)

In 1993, the City issued a request for bid proposals for a new prime contract, which would last for an initial one-year term followed by an automatic four-year renewal option upon satisfactory performance during the initial period. (R. 432-39, 442-43, 475) Four bids were submitted, one of which was a joint bid by four separate companies. City staff reviewed the bids for recommendation to the City Council, and, during a regular meeting, the Council voted to grant the contract to Texas Towing Company through City Ordinance 77716. (R. 19)

In 1995, Texas Towing requested an amendment to its towing services contract, which would grant the City an

option to extend the contract for an additional five-year period, to allow Texas Towing to obtain additional financing and to justify an additional investment in equipment. (R. 887; X 43F) The Council amended the contract accordingly, and, on May 7, 1998, voted to exercise the option through Ordinance 87775. (R. 889; X 43F, G, and H) During this time, Congress enacted the Federal Aviation Administration Authorization Act and then the Interstate Commerce Commission Act for the purpose of deregulating the motor carrier industry.

B. Proceedings Below

On December 4, 1996, Brenda L. Stucky d/b/a Bill's Wrecker Service and Richard Villaneva d/b/a Creswell's 24 Hour Wrecker Service filed a complaint against the City of San Antonio. (R. 1-8) The complaint alleged that section 19-391 of the City Code, as well as Ordinance 77716 and any other laws, regulations, or ordinance concerning price, route, or service of a motor carrier, are preempted by the Federal Aviation Administration Authorization Act, 49 U.S.C. § 14501(c)(1) and (2) ("FAAAA"). (R. 1-8) They also alleged a violation of their civil rights pursuant to 42 U.S.C. § 1983, claiming that the regulations deprived them of property and liberty interests, and alleged a violation of the Sherman Antitrust Act. (R. 1-8, 131-32, 188, 194) The complaint sought injunctive and monetary relief. (R. 1-8)

The City answered the complaint on January 28, 1997, and Texas Towing Corporation intervened shortly thereafter. (R. 62-67, 68-130, 133) Less than a year after filing their complaint, Stucky and Villaneva filed a motion for partial summary judgment, seeking a determination and declaration from the district court of the FAAAA's preemptive effect on the City's code provision and ordinance relating to towing.

(R. 245-357) The City and Texas Towing filed responses, and, on January 20, 1998, the district court issued an order granting the plaintiffs' motion for partial summary judgment and enjoining the City from further enforcement of those provisions. (R. 363-423, 434-97, 537-58) Upon various reconsideration requests, the district court ultimately withdrew its order and invited additional summary judgment filings. (R. 559-607, 608-15, 647, 744-53, 871-85, 760-81, 782-89) The parties followed with a new round of motions for summary judgment, and, on August 25, 1998, the district court issued an order granting in part and denying in part the various motions. (R. 796-807, 811-36, 886-903, 918-38)

In essence, the district court dismissed plaintiffs' section 1983 and antitrust claims with prejudice. The district court found that the City's contract system for towing was not preempted by 49 U.S.C. § 14501(c), but that City Ordinance 82744, amending the contract to provide an option to extend, and City Ordinance 87775, exercising that option, were preempted by the FAAAA. The district court further found that the extension of the contract, without open bid, went against Congress' intent to foster a free market. The district court issued a permanent injunction against the enforcement of these ordinances. A judgment was entered as to certain issues, upon joint motion by the parties, and the City and Texas Towing pursued an appeal to the United States Court of Appeals for the Fifth Circuit. (R. 981-91, 994, 996-97, 998, 1001-02) On December 14, 2000, the Fifth Circuit issued an opinion remanding the case to the district court on procedural grounds and instructing the district court to consider the Fifth Circuit's recent opinion in *Cardinal Towing & Auto Repair, Inc. v. City of Bedford*, 180 F.3d 686 (5th Cir. 1999). (R 1014-17) (Copies of these prior decisions are submitted herewith as a Lodging.)

Upon remand, the parties reurged their respective motions for summary judgment to the district court. On April 3, 2000, the district court granted summary judgment in favor of the City and Texas Towing, finding that the City acted in a proprietary capacity in entering into its towing contract and foreclosing plaintiffs' claims that the City's single-vendor system was preempted by 49 U.S.C. § 14501. (R. 1114-20) The plaintiffs timely filed their notice of appeal on June 1, 2000. (R. 1134-35) The Fifth Circuit again reversed and remanded, holding that the City was not acting in a proprietary capacity in contracting with Texas Towing with respect to consent tows and holding that the safety exemption of section 14501 did not encompass action taken by municipalities. *Stucky v. City of San Antonio*, 260 F.3d 424 (5th Cir. 2001). The Fifth Circuit rejected application of the safety exemption to municipalities, even where the authority for city action had been delegated by a State, which is unquestionably covered by the Act's safety exemption. Petitions for panel and *en banc* rehearing were filed, which were denied by the Fifth Circuit with written opinion. *Stucky v. City of San Antonio*, 266 F.3d 342 (5th Cir. 2001). Petitioners, City of San Antonio and Texas Towing Corporation, have timely pursued this petition for a writ of certiorari.

REASONS FOR GRANTING THE WRIT

This Court is faced with competing state and federal interests, played out in competing state and federal court decisions, on an issue that affects every municipality across the country entrusted by their respective States with authority over towing services. Presented with what it described as a close question, the Fifth Circuit interpreted federal law to prohibit municipalities from contracting with a single vendor for the provision of what the Fifth Circuit defined as consent-

tow services. In so doing, it has denied the State of Texas the authority expressly granted to it by federal law, barring the State from delegating its regulatory duties to municipalities — duties that would otherwise escape federal preemption. It has also denied the City of San Antonio the ability to act in its proprietary function and secure the services necessary to accomplish its duties.

Other federal circuit and state courts have addressed similar questions regarding the preemptive effect of section 14501(c), and there is a pronounced difference of opinion. In fact, two of those decisions are currently pending before this Court: one addressing the municipality as proprietor exemption to preemption, *City of Columbus v. Our Garage & Wrecker Service*, 257 F.3d 506 (6th Cir. 2001), *petition for cert. filed*, __ U.S.L.W. __ (U.S. Sept. 7, 2001) (No. 01-419), which has been redistributed for conference on January 4, 2002; and the other addressing the safety exemption of subsection (c)(2)(A) as applied to municipalities and in which this Court has requested a response and also redistributed for a conference on January 4, 2002, *People ex rel. Renne v. Servantes*, 86 Cal. App. 4th 1081, 103 Cal. Rptr. 2d 870 (2001), *petition for cert. filed*, 70 U.S.L.W. 3162 (U.S. Aug. 14, 2001) (No. 01-336).

The Sixth, Ninth, and Eleventh Circuits, which the Fifth Circuit followed, have all held that the public safety exemption is not available to municipalities, even where those municipalities are exercising their safety authority by virtue of a delegation from the State — an entity expressly acknowledged by all to be covered by the safety exemption of section 14501(c). The Second Circuit, acknowledging the intrusion into State authority such an interpretation would bring, has held that the public safety exemption applies to

municipalities who derive their authority over towing operations from the State. Given the federal-state tension apparent in this question, it is all the more important that a state court, namely the Supreme Court of California, has held that the statute does not prohibit municipal action related to public safety in the context of towing. The Fifth Circuit's decision, made in the midst of this conflict, has effectively prohibited the City of San Antonio, and all other municipalities within its jurisdiction, from protecting citizens on public roads by discouraging the race of tow truck companies to the scene of an accident, a task delegated to the City of San Antonio by the State of Texas.

The lower federal courts also conflict, both with each other and with this Court's precedent, on whether the municipal proprietor exception applies to save ordinances such as the ones at issue here from the FAAAA's preemptive reach. For example, the Fifth Circuit in *Stucky* focused erroneously on whether the municipality supplants the consumer, *i.e.*, whether the tow is one in which the vehicle owner cannot consent, rather than whether the municipality is itself acting as a market participant, regardless of the owner's ability to request tow services and designate a specific provider. That tack is directly contrary to this Court's analysis in *Boston Harbor* and also conflicts with the circuit's earlier treatment of the issue in *Cardinal Towing*. And while other circuits have also focused on the consent/nonconsent dichotomy, they differ vastly in their definitions of "consent" and "nonconsent" tows, bringing the distinction into further question and revealing the Fifth Circuit's analytical flaw in relying exclusively on it. "Given the importance of the issue[s] and the conflict of authority," this Court should grant certiorari. *See Wisconsin Pub. Intervenor v. Mortier*, 501 U.S. 597, 604 (1991).

ARGUMENT

A. Preemption Should Not Be Found by Default

Anytime a court, particularly a federal one, determines whether a federal law supersedes and overrides state or local regulation on the subject pursuant to the Supremacy Clause of the United States Constitution, especially when the law addresses a subject traditionally within the police power of states or municipalities, that court must also consider the dual sovereignty put in place by that same Constitution.

> Federalism was our Nation's own discovery. The Framers split the atom of sovereignty. It was the genius of their idea that our citizens would have two political capacities, one state and one federal, each protected from incursion by the other. The resulting Constitution created a legal system unprecedented in form and design, establishing two orders of government, each with its own direct relationship, its own privity, its own set of mutual rights and obligations to the people who sustain it and are governed by it.

U.S. Term Limits, Inc. v. Thornton, 514 U.S. 779, 838 (1995) (Kennedy, J., concurring). "When pre-emption of state law is at issue, we must respect the 'principles [that] are fundamental to a system of federalism in which the state courts share responsibility for the application and enforcement of federal law.' " *Johnson v. Fankell*, 520 U.S. 911, 922 (1997). Given this tension between the Supremacy Clause, from which the preemption doctrine derives, and the federalist structure of the United States Constitution as a whole, courts have been reluctant to find federal preemption unless Congress' intent is unmistakable.

For example, both the Fifth Circuit, in an earlier decision addressing the preemptive effect of section 14501(c), and this Court have recognized that "when preemption is invoked to prevent a state or municipality from wielding its traditional police powers [such as setting the terms and conditions governing municipal contracts], congressional intent to displace that authority must be 'clear and manifest.' " *Cardinal Towing & Auto Repair, Inc. v. City of Bedford, Tex.*, 180 F.3d 686, 690 (5th Cir. 1999), *citing California v. ARC Am. Corp.*, 490 U.S. 93 (1989) and *Atkin v. State of Kansas*, 191 U.S. 207 (1903). The Fifth Circuit in this case, however, failed to give appropriate deference to local authority and held that federal law preempted municipal ordinances, though the court stated no less than twice that the question before it was close, characterized the legislative history as "ambiguous," and acknowledged precedent from this Court casting doubt on its interpretation of the "plain" statutory language. *Stucky*, 260 F.3d at 430, 440, 443, 444-45. Such a departure from traditional preemption analysis cannot stand, particularly when it is in stark contrast to the analysis conducted by other federal circuit, federal district, and state courts on the very federal provision at issue here.

B. The City of San Antonio's Single-Vendor Towing System Falls Within the Public Safety Exemption of Section 14501(c)(2)(A)

Section 14501(c)(2)(A) mandates that the FAAAA "*shall not* restrict the safety regulatory authority of a State with respect to motor vehicles." (emphais added) Public safety has long been considered a province of the state, creating a presumption against federal preemption in that field.

See Medtronic, Inc. v. Lohr, 518 U.S. 470, 475 (1996).[2] However, the federal circuit courts, as well as federal and state courts, have split on the issue of whether section 14501(c)(2)(A) applies to municipalities, even where those municipalities are acting pursuant to authority delegated to them by the State.

1. States Retain Authority to Regulate in the Area of Safety, Which Includes the Authority to Delegate Regulatory Duties to Municipalities

The Eleventh Circuit was the first to address the applicability of section 14501(c)(1) to municipal towing ordinances since the passage of the ICC Termination Act of 1996, and did so in *R. Mayer of Atlanta, Inc. v. City of Atlanta*, 158 F.3d 538, 544 (11th Cir. 1998), *cert. denied*, 526 U.S. 1038 (1999). In *Mayer*, several towing companies in the Atlanta area challenged the City of Atlanta's consensual towing system that governed towing within Atlanta's city limits. The Eleventh Circuit held that the ordinances were preempted and found that the Act's public safety exemption extended only to States, not their political subdivisions. The Sixth and Ninth Circuits followed and held similarly. *Petrey v. City of Toledo*, 246 F.3d 548, 560-61 (6th Cir. 2001); *Tocher v. City of Santa Ana*, 219 F.3d 1040, 1050-51 (9th Cir. 2000), *cert. denied*, 531 U.S. 1146 (2001). The Fifth Circuit in *Stucky* joined this jurisprudential majority. *Stucky*, 260 F.3d at 446.

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2. For this reason, "municipal regulation of the business of towing is not unusual." *Interstate Towing Ass'n, Inc. v. City of Cincinnati*, 6 F.3d 1154, 1165 (6th Cir. 1993). There is ample support in the record, as recognized by the Fifth Circuit, that safety motivated the ordinances and code provision in question. (R. 375-77, 423, 476-77, 823(16-19), 824-25(30-36), 1040-44; X 43C-1)

The problem with these Circuits' reasoning is their requirement that safety authority be conferred *directly* upon municipalities by virtue of section 14501(c)(2)(A) in order for the safety exemption to apply to any municipal ordinance. *Petrey*, 246 F.3d at 561-62; *Tocher*, 219 F.3d at 1050 ("section 14501(c)(2)(A) only exempts safety regulations promulgated by state governments, not those enacted by municipalities"); *Mayer*, 158 F.3d at 545-46. The Second Circuit explained how this analysis misses the mark:

> [W]e see no reason to construe this language to prevent the state from delegating *its* regulatory authority to a municipality. To the contrary, the legislative history indicates that state safety regulatory authority (including, presumably, the authority to delegate) was to be 'unaffected' by the preemption statute.

Ace Auto Body & Towing, Ltd. v. City of New York, 171 F.3d 765, 775 (2d Cir.) (emphasis in original), *cert. denied*, 528 U.S. 868 (1999). In fact, this Court has recognized that States have traditionally re-delegated regulatory powers to municipalities. *Wisconsin Pub. Intervenor v. Mortier*, 501 U.S. 597, 607-09 (1991), *cited in Harris County Wrecker Owners v. City of Houston*, 943 F. Supp. 711, 726-27 (S.D. Tex. 1996), *abrogated by Stucky*; *see also Martin v. Stites*, 2001 WL 121855, *10 (10th Cir., Feb. 13, 2001) (unpublished) (Briscoe, C.J., concurring and dissenting) (recognizing the conflict and the need for resolution), *cert. denied*, 122 S. Ct. 64 (2001).

Joining the Second Circuit is a California state court, which has held that the City of San Francisco's ordinances, enacted pursuant to authority delegated by the State of

California, escape preemption when they come within the FAAAA's safety exemption. *People ex rel. Renne v. Servantes*, 86 Cal. App. 4th 1081, 1092-94, 103 Cal. Rptr. 2d 870 (2001), *petition for cert. filed*, 70 U.S.L.W. 3162 (U.S. Aug. 14, 2001) (No. 01-336). Though the *Servantes* court addressed only towing from private property, and not San Francisco's statutory scheme regulating the removal of vehicles from streets and highways by police officers, its holding rested on the preemptive reach of the Act. *Servantes*, 86 Cal. App. 4th at 1084 n.2, 1092-94. The *Servantes* court explained that the *Tocher* concern regarding the potentially expansive practice of state delegation to municipalities was "overstated." *Id.* at 1094 ("Had Congress intended not to except municipal safety regulations, Congress could have said so"). The *Servantes* court also followed the lead of *Ace Auto*, finding in the legislative history "no expression of a congressional desire to preempt local control over safety issues." *Id.*

Still other courts, before the Fifth Circuit's decision in *Stucky*, had concluded that use of the word "State" in the safety exemption "does not mean that this subsection of the status does not also allow municipal regulation." *Harris County Wrecker Owners v. City of Houston*, 943 F. Supp. 711, 726 (S.D. Tex. 1996), *abrogated by Stucky*, *citing Mortier*, 501 U.S. at 607-09, 611-12. The *Harris County* court recognized the ability of states to delegate authority to local government and noted that nothing in either the statute's text or its legislative history precluded such a reading. *Id.* at 726-27; *see also City of Charleston v. Government Employees Ins. Co.*, 869 F. Supp. 378, 386 (D.S.C. 1994) (holding that nothing in the history of the McCarran-Ferguson Act, 15 U.S.C. §§ 1011, 1012, which removed all Commerce Clause limitations on "a State" to regulate and tax the business of

insurance, or its overall structure, is inconsistent with allowing states to delegate taxing authority to municipalities), *opinion vacated*, May 18, 1995.

The *Harris County* court also noted that subsection (c)(2)(A) allows "a State to impose highway route controls or limitations based on . . . the hazardous nature of the cargo," which is a reference to the Hazardous Materials Transportation Authorization Act of 1994, 49 U.S.C. §§ 5101-5127. *Harris County*, 943 F. Supp. at 727. The HMTA Act makes clear that municipal authority over the routing of hazardous materials shipments by motor carriers is allowed, as long as it complies with the Act's standards. *Id.* As a result, because delegation is allowed in this instance, there is nothing to suggest that it is not allowed with respect to the safety exemption as well. *See also AJ's Wrecker Serv., Inc. v. City of Dallas*, 1998 WL 185521, *3 (N.D. Tex., Apr. 15, 1998) ("Section 14501(c)(2)(A) . . . preserves the City's authority to regulate motor vehicle safety"), *abrogated by Stucky*; *Hott v. City of San Jose*, 92 F. Supp. 2d 996 (N.D. Cal. 2000) (holding that federal law "does not preempt local regulations that concern safety when such regulations are authorized by state statute"), *aff'd*, 2001 WL 1458017 (9th Cir., Nov. 16, 2001) (unpublished); *New Orleans Towing Ass'n, Inc. v. City of New Orleans*, 2000 WL 193071, *9 (E.D. La., Feb. 15, 2000) ("although Congress did not expressly extend the protection of the safety exception to municipalities, this does not preclude a state from delegating its regulatory authority to the city"), *abrogated by Stucky*; *Northway Towing, Inc. v. City of Pasadena, Texas*, 94 F. Supp. 2d 801, 802 (S.D. Tex. 2000) (citing *Harris County*), *abrogated by Stucky*.[3]

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3. *See also Syldyld, Inc. v. City of San Jose*, 2001 WL 1459523 (9th Cir., Nov. 16, 2001) (unpublished) (following *Tocher*); *California* (Cont'd)

Absent any showing of intent on the part of Congress to override a State's interest in delegating this authority, a State must be allowed, per the statute's express terms, to legislate as it sees fit. *But see Tocher*, 219 F.3d at 1051 ("for section 14501(c)(2)(A) preemption purposes, a state may not delegate its regulatory authority to a municipality"). The State of Texas has expressed its intention to delegate its authority over tow truck operations to municipalities by stating that "a municipality may regulate the operation of a tow truck to the extent allowed by federal law." TEX. TRANSP. CODE § 643.201(a) (Vernon Supp. 2002). This delegation of authority by a State to municipalities to allow those municipalities to operate as arms of the State has been recognized by Texas' High Court. *City of College Station v. Turtle Rock Corp.*, 680 S.W.2d 802, 805 (Tex. 1984); *Town of Ascarate v. Villalobos*, 148 Tex. 254, 223 S.W.2d 945, 950 (1949).

The Fifth Circuit's reading is also inconsistent with the Department of Transportation's interpretation of the provision. The Department has read subsection (c)(2)(A) as exempting both state and local safety regulations from

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(Cont'd)
Dump Truck Owners Ass'n v. Davis, 2001 WL 1504373, *5 (E.D. Calif., Oct. 30, 2001) ("the safety regulation exception . . . does not extend to California Code provisions which authorize local ordinances"); *Southern Blasting Servs., Inc. v. Wilkes County*, 162 F. Supp. 2d 455, 464-65 (W.D.N.C. 2001) (explaining that section (c)(2)(A) does not exempt political subdivisions of the state from the preemptory language of § 14501(c)(1)); *City of Cleveland v. Fox*, 2001 WL 792701, *3 (Ohio Ct. App., July 12, 2001) (unpublished) (following *Petrey*, but recognizing conflict); *City of Columbus v. Garrett*, 2001 WL 289980, **4-5 (Ohio Ct. App., March 27, 2001) (unpublished) (following *Mayer*, but recognizing conflict).

preemption. U.S. DEP'T OF TRANSP., INTRASTATE TRUCKING DEREGULATION; *see also Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842-43 (1984) (holding that in reviewing agency's construction of statute, when text of statute is ambiguous, court must not substitute its own interpretation for reasonable interpretation by agency charged with statute's administration); *Texas Savings & Cmty. Bankers Ass'n v. Federal Hous. Fin. Bd.*, 201 F.3d 551, 554 (5th Cir. 2000) (same).

2. Recognizing the Authority Congress Left to the States Neither Increases Nor Decreases the Potential for Municipal-Specific Safety Regulation

The majority of circuits have also rested their determination that the safety exemption does not apply to municipal ordinances on the theory that to rule otherwise would leave in place or allow for a tangled web of regulation and that to leave this authority to the States alone would prevent such a patchwork. *Stucky*, 260 F.3d at 431; *Petrey*, 246 F.3d at 563; *Tocher*, 219 F.3d at 1051; *Mayer*, 158 F.3d at 546. However, none of these decisions explains why this would not result from direct State regulation alone. There is nothing in section 14501(c) that prohibits States from enacting tow truck regulation on a city-by-city basis, and there has been no hint from the federal circuit courts that the State's regulatory approach somehow informs whether the safety exemption would be held to apply. In fact, the State of Texas has addressed the issue on an individual basis by delegating its tow truck oversight to the various municipalities within its borders. Moreover, the legislative history on which *Stucky* and other courts have relied indicates that the crux of Congress' concern was the effect of multiple regulations on interstate commerce by national and regional carriers, not

the effect of localized practices in the context of pure intra-municipal towing. H.R. CONF. REP. 103-677, at 87 (1994), *reprinted in* 1994 U.S.C.C.A.N. 1715, 1759; *see also* H.R. CONF. REP. No. 104-311, at 82 (1995), *reprinted in* 1995 U.S.C.C.A.N. 797:

> [s]ince motor carrier transport is a truly *interstate* industry, it is critical to the smooth functioning of commerce that there be federal commercial rules established to ensure that all *interstate* transportation is subject to the same rules and procedures. Otherwise, a motor carrier would be potentially subject to 50 different rules for operation

(emphasis added).

As the Second Circuit in *Ace Auto* explained, the legislative history made clear that a state's safety regulatory authority, including the authority to delegate, was to be "unaffected" by the preemption statute. *Ace Auto*, 171 F.3d at 775, *quoting* H.R. CONF. REP. No. 103-677, at 84, 85, *reprinted in* 1994 U.S.C.C.A.N. at 1756, 1757. The *Ace Auto* court continued that while Congress had a deregulatory purpose in mind, the scope of that purpose is unclear and suggests that the key was to eliminate local economic regulation, not local safety regulation. *Ace Auto*, 171 F.3d at 775; *see also Californians for Safe & Competitive Dump Truck Transp. v. Mendonca*, 152 F.3d 1184, 1187 (9th Cir. 1998) (explaining FAAAA's purposes as across-the-board deregulation and leveling the playing field between air and motor carriers), *cert. denied*, 526 U.S. 1060 (1999). As a result, this Court should "hesitate to construe the text of § 14501 so as to frustrate unnecessarily the ability of

municipalities to respond to the local safety concerns created by local towing industries." *Ace Auto*, 171 F.3d at 775.

Such an approach makes sense. Practically, regulation of public safety concerns as they relate to towing from public streets and ways must be addressed by individual municipalities. The relevant considerations depend on factors unique to each municipality, such as population, city layout, and traffic patterns. The public safety concerns of a small city are, by necessity, different from those faced by the City of San Antonio, one of the most populated cities in the country. To expect the State of Texas to be able to create a public safety scheme to be applied across the board is unrealistic, as is the expectation that the State could create efficient safety regulations for each city individually. Absent evidence of express Congressional intent to preclude it, public policy dictates that municipalities be allowed to determine what safety concerns each faces and the best method for addressing them when that authority is conferred by the State.

3. *Mortier* Is Controlling, or At Least Informative, on the Extent to Which a State's Authority to Regulate Is Preserved

Finally, the courts conflict in their interpretation of this Court's decision in *Wisconsin Public Intervenor v. Mortier*, 501 U.S. 597 (1991). In *Mortier*, this Court was concerned with the preemptive reach of FIFRA and whether it extended to local regulation of pesticide use. As the Fifth and other circuits have noted, the *Mortier* Court held that exclusion of political subdivisions from the ability to regulate could not be inferred from FIFRA's text, particularly where such regulatory authority was expressly conferred upon the States

and where political subdivisions are components of the very entity the statute empowers. *Id.* at 607-08. The majority of federal circuit courts addressing the FAAAA's preemptive reach have drawn a distinction between the *Mortier* decision, which addressed FIFRA, and the text of the FAAAA. The distinction rests on FIFRA's silence with respect to political subdivisions and the FAAAA's reference to political subdivisions several times in its text, though not in the context of the safety exemption. Faced with this wording, courts have held that the omission of a reference to political subdivisions from the safety exemption was no accident and that *Mortier* does not require that the phrase "political subdivisions" be read into the word "State" every time it is used in a statute. *Stucky*, 260 F.3d at 443; *Petrey*, 246 F.3d at 562; *Tocher*, 219 F.3d at 1051; *Mayer*, 158 F.3d at 547.

What those courts fail to realize about *Mortier* is that its reasoning went beyond merely reading the words "political subdivisions" into the word "State" for purposes of determining what entities were authorized to regulate pesticide use *directly*. Instead, the Court's holding rested on giving effect to the express preservation of a *State's* ability to regulate, when that ability might be exercised through delegation to a political subdivision such as a municipality — a holding that has been ignored by every circuit but the Second. *Ace*, 171 F.3d at 775-76, *quoting Mortier*, 501 U.S. at 608 ("the more plausible reading of FIFRA's authorization to the States leaves the allocation of regulatory authority to the 'absolute discretion' of the States themselves, including the option of leaving local regulation of pesticides in the hands of local authorities"); *see also Mortier*, 501 U.S. at 608 ("to read this provision as pre-empting localities would also require the anamolous result of pre-empting the actions of any agency to the extent it exercised *state-delegated*

powers that included pesticide regulation"), and at 609 ("While this statement indicates an unwillingness by Congress to grant political subdivisions regulatory authority, it does not demonstrate an intent to prevent the States from *delegating* such authority to its subdivisions, and still less does it show a desire to prohibit local regulation altogether") (emphasis added).

C. The City of San Antonio Has Acted in Its Proprietary Capacity in Opting for a Single-Vendor Towing System

When a municipality acts in its proprietary capacity, contracting for its own benefit, its actions are not subject to preemption by federal law. *Building & Constr. Trades Council v. Associated Builders & Contractors of Massachusetts/ Rhode Island, Inc.*, 507 U.S. 218, 226-27 (1993) ("*Boston Harbor*"). This Court has distinguished between the State acting as a market regulator and the State acting as a market participant, explaining that "where a State acts as a participant in the private market, it may prefer the goods or services of its own citizens, even though it could not do so while acting as a market regulator." *College Sav. Bank v. Florida Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 685 (1999). Several circuit courts have also addressed the applicability of the municipal proprietor exception to preemption under the FAAAA (the Fifth Circuit having done so twice), and, again, the results have varied.

1. The Fifth Circuit First Addressed the Issue and Has Done So Inconsistently

In *Cardinal Towing & Auto Repair, Inc. v. City of Bedford*, 180 F.3d 686 (5th Cir. 1999), the Fifth Circuit upheld a city's right to contract for the provision of towing

services, applying the analysis adopted by this Court in *Building & Constr. Trades Council v. Associated Builders & Contractors of Massachusetts/Rhode Island* ("*Boston Harbor*"), 507 U.S. 218 (1993). In *Boston Harbor*, this Court held that when a municipality acts as a participant in the market, in a narrow and focused manner akin to other market participants, the city is not acting as a regulator and its actions are not subject to preemption. *Boston Harbor*, 507 U.S. at 227-33. The *Cardinal Towing* court explained the two-part test for determining whether the city is acting as market participant or regulator: (1) whether the challenged action reflects the city's own interest in the "efficient procurement of needed goods and services, as measured by comparison with the typical behavior of private parties in similar circumstances"; and (2) whether the narrow scope defeats an inference that the "primary goal was to encourage a general policy rather than address a specific proprietary problem." *Cardinal Towing*, 180 F.3d at 693. It determined that in the context of "true nonconsent tows," the market participant exception applied and saved the City provisions from preemption. *Id.* at 693-94.

Here, the City of San Antonio has a proprietary interest in the efficient procurement of towing services on behalf of the City to maintain the public ways. (R. 375-77, 476-77, 1040-44) The City's actions in contracting for the provision of these services is akin to a private property owner's contracting with a towing company to provide a tow from his land. The contract at issue in this case, along with relevant ordinances and code provisions, extend only to City-authorized tows, *i.e.*, a narrowly-defined area limited to, for example, vehicles that have been abandoned or involved in a collision and not affecting towing from private property. This narrow scope does not create or encourage a general

policy that affects the towing industry at large. Instead, the system affects only those tows authorized by the City, which are only those tows from public ways in certain circumstances; and there exists no record support for the notions that the City's system affects a significant portion of the towing services market or that it is intended to implement a public regulatory plan, though the Fifth Circuit drew its own unsupported conclusions in that regard. *Stucky*, 260 F.3d at 439. Accordingly, the City's actions are proprietary, not regulatory, in nature, and not subject to preemption.

The Fifth Circuit's rejection of the Petitioners' position in *Stucky* rested solely on the distinction between consent and nonconsent tows, a distinction allegedly set forth in *Cardinal Towing*. *Stucky*, 260 F.3d at 437. However, the Bedford towing system addressed in *Cardinal Towing* actually affected "consent tows" as the *Stucky* panel defined that term. In *Stucky*, the court rejected the notion that all tows from the scene of accidents on public ways are properly characterized as nonconsensual. *Id.* at 434 n.11. However, the Bedford system defines a "nonconsent tow" as "any tow conducted without the permission of, or not at the direction of, the vehicle's legal or registered owner or such owner's authorized representative." BEDFORD, TEX., MUN. CODE § 126-156. Furthermore, regardless of the definition, "certified law enforcement officials may control the scene of an accident in the manner they deem appropriate," and tow companies are specifically prohibited from soliciting business at or near the scene of wrecks. *Id.* at §§ 126-156, 126-157. Thus, it is not at all clear that the consent/nonconsent dichotomy should be the measuring stick for determining the application of *Boston Harbor*, given that the distinction has been applied differently within the Fifth Circuit, as well as among the various circuit courts that have addressed it.

2. The Circuit Courts Have Distinguished Between Consensual Versus Nonconsensual Tows in Markedly Different Ways

All the circuit courts that have addressed application of the proprietary exception to preemption under the FAAAA have based their determination on whether the ordinance(s) in question relates to consensual or nonconsensual tows. *Petrey*, 246 F.3d at 558-59 (holding that challenged municipal towing provisions, which dealt solely with those towers wishing to perform non-consensual police tows for the City, were proprietary in nature and not preempted); *Tocher*, 219 F.3d at 1049 (holding that municipal code provision, which covered nonconsensual tows, escaped preemption by virtue of municipal-proprietor exception). However, the definitions used to delineate between the two types and where exactly that line is drawn varies from circuit to circuit.

In *Tocher*, for example, the court characterized as "nonconsensual tows" those that concern "abandoned, disabled, stored or impounded vehicles from public or private property," but went on to say that the City, pursuant to its ordinance and rotational tow list, wanted merely to create a "reliable list of towing companies who could render quick and efficient towing services for *the City*." *Tocher*, 219 F.3d at 1049 (emphasis added). The Ninth Circuit was quick to note that the City of Santa Ana's scheme "in no way affects the relationship between towing companies and the general public" because the code's scope covered "only contracts between the City and towing companies." *Id.*

In *Petrey*, the Sixth Circuit defined all police-ordered tows as nonconsensual. *Petrey*, 246 F.3d at 558. In addressing a municipal provision that related to consensual tows,

the *Petrey* court explained that it did not escape the preemptive effect of the Act because it applied to tow drivers "not doing work for the Toledo Police Department." *Id.* at 559. And in *Mayer*, although the Eleventh Circuit did not address the market participant doctrine, it did define consensual and nonconsensual tows differently from other circuits. Consensual tows were defined as those "which occur when the owner of a vehicle expressly requests towing services to be provided by a specific towing company and enters a private contract with the towing company for the services." *Mayer*, 158 F.3d at 541. Nonconsensual towing services were defined as occurring "when law enforcement or other local authorities determine that a vehicle must be towed and the owner of the vehicle is not afforded the opportunity to request towing services from a specific company. An example of a nonconsensual tow arises when an abandoned car is impounded by police." *Id.* at 541 n.2.

Thus, the *Mayer* and *Petrey* courts used definitions like those of the City, and much less restrictive than those used by the Fifth Circuit in *Stucky*. In fact, the Fifth Circuit's definition of nonconsensual tows was much more expansive in the *Cardinal Towing* decision, which held all ordinances relating to nonconsensual tows fall within the City's proprietary function and outside of any preemptive effect of the FAAAA. Finally, the statute has its own definition. In discussing the regulation of prices for non-consent tows, the statute expressly characterizes them as those "performed without the prior consent or authorization of the owner or operator of the motor vehicle" — again a much broader definition than employed by the *Stucky* court. 49 U.S.C. § 14501(c)(2)(C).

3. The Only Relevant Question Under *Boston Harbor* Is Whether the City Is Acting as a Market Participant

Not only is it unclear where the line should be drawn between consent and nonconsent tows, but the question remains whether this should be the measuring stick at all. The *Cardinal Towing* court used this delineation because it fit nicely into its "consumer" model, *i.e.*, whether the proprietary exception applied depended upon whether the City was the "consumer" of the towing services. Only if there were no other consumer available could the City step into those shoes. However, the tests as stated in *Cardinal Towing* and applied by the district court under review demonstrate that the question is much less superficial than that. Instead, the question is whether the City is acting in its own interest and to address a specific proprietary problem, rather than attempting to regulate an entire industry. *Cardinal Towing*, 180 F.3d at 693; *Stucky v. City of San Antonio*, 2000 WL 33348252, *2 (W.D. Tex., Apr. 4, 2000). Whether a consumer other than the City is available to make a towing decision, the ordinances and single-vendor towing system apply only to tows directed by the City from public streets and are aimed at eliminating the situations that arise from tow truck races to accident scenes, which serve to make the City's job of maintaining order on public ways more difficult. *Cardinal Towing*, 180 F.3d at 696 (explaining that City acts "in the pursuit of its own interests" in obtaining towing services "to maintain traffic flow in the wake of an accident and remove abandoned vehicles blighting their environment"). As explained by the district court:

> The City ordinances deal exclusively with City-directed tows; there is no effort by the City

> evidenced in the record to affect the conditions under which tow operators conduct their business otherwise. The City's policies do not reach the general towing industry or the availability of wreckers, the proper equipment, or response time required outside of City-directed tows. While the City's scheme does include consent tows, the City has argued that the inclusion narrowly addresses its proprietary concerns — the swift and efficient removal of disabled vehicles from City streets. . . . The Court cannot say that these concerns are not legitimate and certainly cannot say that they mask a desire on the part of the City to regulate its private towing companies.

Stucky, 2000 WL 33348252, at *4. The City is not attempting to regulate; instead, its efforts reflect the purchase of "services that its operations require in the open market." *Stucky*, 260 F.3d at 433; *see also Cardinal Towing*, 180 F.3d at 693 ("Courts have similarly shielded contract specifications from preemption when they applied to a single discreet contract and were designed to insure efficient performance rather than advance abstract policy goals").

Highlighting the erroneous reliance on consent versus nonconsent tows as the litmus test for determining whether the City is acting as participant or regulator, the Texas Legislature amended the definitions of consent and nonconsent tows on September 1, 2001. Specifically, "consent" tow has been clarified:

> "Consent tow" means any tow of a motor vehicle initiated by the owner or operator of the vehicle or by a person who has possession, custody, or

> control of the vehicle. The term does not include a tow of a motor vehicle initiated by a peace officer investigating a traffic accident or a traffic incident that involves the vehicle.

TEX. TRANSP. CODE § 643.201 (Vernon Supp. 2002). The Fifth Circuit, in its opinion denying the petitions for rehearing, dismissed the amendments as irrelevant, stating that the City could not escape the preemptive effect of section 14501(c) simply by redefining "consent tow." *Stucky v. City of San Antonio*, 266 F.3d 342 (5th Cir. 2001) ("The new statutory definitions add nothing to the City's failed argument that the mere presence of a city officer makes for a non-consent tow"). The Fifth Circuit rejected the relevance of the amendments though the court itself had relied on the legislative definitions to support its earlier decision and even though the system addressed by the Fifth Circuit in *Cardinal Towing* relied on definitions similar to those adopted by the amendment. *Stucky*, 260 F.3d at 434 n.11 ("We abide by those definitions"). What the amendment does is give weight to the district court's discussion of and focus on the City's goals, rather than whether the driver/owner has the capacity to consent, contrary to *Stucky*'s approach.

Furthermore, the limited scope of the City of San Antonio's towing system as a whole more closely approaches that allowed in *Cardinal Towing*, rather than the "industry licensing schemes and other industry wide regulations" which have been found within the preemptive effect of the FAAAA in *Petrey* and *Tocher*. Though the Fifth Circuit below recognized that the City's efforts did not come near those schemes struck down in *Petrey* and *Tocher*, it failed to recognize the limited scope of the City's system as a basis for rejecting the notion that the City acted in an attempt to

regulate the entire towing industry. *Stucky*, 260 F.3d at 437. Recognizing that it was "unable to determine, based on an analytically satisfying continuum, whether the instant Ordinances are within *Cardinal Towing*'s 'narrow scope,' " the *Stucky* Court turned to the purposes behind the ordinances, which it found to be safety. *Id.* at 437-38.

The parties below conceded that safety was the motivating factor, but the Fifth Circuit, in contrast with this Court's precedent, asked the wrong question. The question is not whether the City, in acting, is attempting to satisfy its duties as a governmental entity — it will *always* be attempting to accomplish those objectives. Instead, the question is, when the City acts, is it doing so in an effort to regulate or is it merely purchasing the services that are required for the accomplishment of its tasks. *Boston Harbor*, 507 U.S. at 227-33. The *Stucky* court went on to reject the argument that the safety purpose behind the ordinances affects the preemptive effect of the FAAAA on *nonconsent* tows. *Stucky*, 260 F.3d at 438 n.19 ("That the City may have initially entered into the single-vendor system for safety reasons, however, does not affect the analysis under *Cardinal Towing*"). In fact, that the City had as its purpose to maintain a safe accident scene, actually defeats any notion that the City was attempting to regulate the towing industry at large.

CONCLUSION

The construction placed upon the Federal Aviation Administration Authorization Act by the Fifth Circuit constrains a State's ability to regulate in the area of safety by delegating its authority to municipalities. That approach is contrary to this Court's precedent, other federal and state court decisions, and the express language of the FAAAA. Furthermore, in failing to recognize the ability of the City of

San Antonio to participate in the towing market, free from the FAAAA's preemptive effect, the Fifth Circuit has prohibited the procurement of services necessary for the City to carry out *its* duties and has erroneously ascribed a regulatory motive to the City based on a limited foray into the towing market. The Fifth Circuit itself has been inconsistent in its approach to the FAAAA's preemptive reach, and has demonstrated itself all too eager to find preemption in an area within the State's traditional police powers and without evidence of any regulatory intent on the City's part. Given the importance of these issues, the far-reaching consequences of the Fifth Circuit's decision, and the absence of uniformity among the circuits and among other federal and state courts on these questions, this Court should grant the petition for writ of certiorari and reverse the judgment of the United States Court of Appeals for the Fifth Circuit.

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